

Mathews Law Firm, P. A. uses various estate planning, charitable giving, and other methods of asset management to assist our clients in different types of family estate planning issues. This article will briefly review the basic documents that form the foundation for the estate planning process.

One of the most frustrating things our estate planning clients face is the overwhelming amount of available information and changing laws. Therefore, it is important that we provide our clients with straightforward and up-to-date information. Furthermore, because the types of planning which must be made almost always involve balancing interests and tradeoffs of risks, benefits and liabilities, accurate information is crucial.

Also, although people have a variety of motivations for engaging in the estate and financial planning process, some of the most common reasons we encounter (not necessarily in order of relative importance) are as follows:

1. Certainty and timely distribution of assets to intended beneficiaries;
2. Tax avoidance or reduction;
3. Business succession and continuation;
4. Providing for individuals with special needs;
5. Charitable giving; and
6. Preservation and conservation of assets.

Therefore, whether the estate planning process for a particular person consists of simple directions for distribution of assets, or complex multilevel tax planning strategies, every adult should have a will and the four advance directive documents which are specifically authorized in Florida.

The primary document for controlling disposition of one's assets at death is the will. If a person dies without a valid will, all probate assets of the deceased person will be distributed according to the Florida inheritance statute. The probate court will appoint a personal representative to administer the estate and distribute all the property to the decedent's heirs. The inheritance statute dictates that only family members will be entitled to inherit. The decedent's assets will be distributed in the following manner:

- 1) To spouse and descendants first.
- 2) If no spouse or descendants exist, to parents.
- 3) If no parents exist, to siblings.
- 4) If no siblings exist, to aunts, uncles and cousins.
- 5) Finally, if no family members exist, the estate assets would be transferred to the State of Florida.

This statutorily imposed "estate plan" is almost never what the decedent would have intended. Accordingly, particularly in the case of unmarried couples or other nontraditional families, a carefully drafted will is the only mechanism available for transferring probate assets to the surviving partners.

One alternative to the probate process is that the ownership structure of selected assets can be arranged to provide benefits to survivors. A common method is to create joint ownership of assets such as real property, bank or investment accounts, and other "titled" assets (e.g. automobile, boats, etc.). Another mechanism is to carefully draft beneficiary designations for insurance policies, IRAs, retirement plans, annuities or other benefits. Joint ownership and beneficiary designations work well for certain assets, but there may be limitations imposed by related contracts or adverse tax or asset protection consequences.

Another popular method for providing for testamentary type distributions outside the context of a will and the probate process is the Revocable Living Trust (RLT). A revocable trust (the "trust agreement") is a document created to manage a person's assets during their lifetime and distributes the remaining assets after their death. The person who creates a trust is called the "grantor" or "settlor." The person responsible for the management of the trust assets is the "trustee." The grantor can serve as trustee, or another person, bank or trust company may be appointed. The trust is "revocable" since the grantor may modify or terminate the trust during life, as long as the grantor is not incapacitated.

During the grantor's lifetime the trustee invests and manages the trust property. Most trust agreements allow the grantor to withdraw money or assets from the trust at any time, and in any amount. If the grantor becomes incapacitated, the trustee is authorized to continue to manage the trust assets, pay bills, and make investment decisions. This may avoid the need for a court-appointed guardian. This is one of the advantages of a revocable trust. Upon the grantor's death, the trustee (or the successor if the grantor was the initial trustee) is responsible for paying all claims and taxes, and then distributing the assets to the beneficiaries as described in the trust agreement.

For the RLT to function optimally, the grantor's assets, such as bank accounts, real estate and investments, must be formally transferred to the trust before death. This process is called "funding" the trust and requires changing the ownership of the assets to the trust. Assets that are not properly transferred to the trust may be subject to probate. However, certain assets should not be transferred to a trust because income tax problems may result. A tax advisor should be consulted to determine which assets are appropriate for trust ownership. (An irrevocable trust may also be appropriate for consideration upon further analysis.)

The foregoing discussion relates to the disposition of property and assets at death. By comparison, the four advance directive documents discussed below allow a person to authorize others to make certain decisions on their behalf during their lifetime. Similar to the absence of a will, in the absence of advance directives an incapacitated person will have missed their only opportunity to control these matters, and Florida law will provide preferences or default provisions which probably do not comport with the incapacitated person's intentions. These legal default provisions typically favor conventional family members, and ignore unmarried partners or nontraditional families. Properly drafted advance directives can overcome these problems.

The **Power of Attorney** is a powerful document which delegates authority for one person to act on behalf of another. We typically recommend a **Durable General Power of Attorney** which provides a broad scope of authority to act even in the event of the person's incapacity. In this manner the person (principal) may choose another (attorney-in-fact) to sign contracts, make business decisions, handle financial matters, execute legal documents and do almost anything the principal

could have done. Even though the Power of Attorney is most frequently exercised on behalf of an incapacitated person, it may be exercised at any time prior to the principal's death.

Another helpful advance directive document is the **Designation of Health Care Surrogate**. The health care surrogate designation is effective only during periods of incapacity, and designates a person who has the authority to make all health care decisions.

Similarly related to health care matters, is the **Living Will** (not to be confused with Living Trust). The Living Will provides instructions to health care providers regarding the person's fundamental right to refuse medical treatment or procedures which would only prolong life when a terminal condition exists. By setting forth a person's desires in a Living Will such rights may be exercised even in the event of incapacity. This is a popular topic of discussion by all who are distressed by the fifteen year saga of legal battles over Terry Schiavo, a young incapacitated woman from Tampa, Florida.

Finally, Florida authorizes a competent adult to name a **Preneed Guardian** who may be appointed upon the person's incapacity. The person so named will have a rebuttable presumption as guardian in any court proceeding to establish the guardianship.

An additional planning tool to be used in conjunction with a will and advance directives is a premarital or cohabitation agreement. These are private agreements which provide an opportunity for partners, whether contemplating marriage or not, to establish their respective rights at specific times, including death or disability.

The documents described above constitute the basic beginnings for a comprehensive estate, financial, business and family plan. By necessity, the foregoing descriptions are not a complete review of all of the issues that may be encountered in a particular situation, and do not constitute legal or tax advice. Consultation with a team of advisors will be necessary to determine the proper way to formulate these documents and to determine whether additional techniques will be helpful to achieve individual and family goals and objectives.

For a more complete discussion of the topics mentioned herein or for other questions, please contact Matt Mathews at (850) 681-9303.